85-743

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. A-124

DAVID W. STEWART,
Petitioner,

V.

RICHARD P. SEARS, et, al,
Respondents,

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF OHIO

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40 pp

I

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not it is within the legislative authority of the State of Ohio to provide by law that, at the end of the trial courts hearing on a petition for adoption that the records, documents and transcript of the hearing will be sealed, even to the parties to the action and from that day forth, it is solely within the trial courts discretion whether or not they are ever to be made available to anyone again including appellate purposes. This is provided for in R.C. 3107.17. Appendix D.

2. Whether or not it is within the legislative authority of the State of Ohio to set a time limitation for appeals and enforce that limitation against parties to the action who could not know and were not advised that a contingency had occured which started the time limitation running. In this case, the law did not require and neither the court nor respondents notified petitioner that the adoption had been

granted by the court. Petitioner was disabled and could not appear at the hearing. Therefore, he could not know that the time limitation was running. The court thereafter refused to confirm or deny that the adoption had been granted. It was eight years later before petitioner found that a Final Decree of Adoption had been filed with the divorce papers in Salt Lake City, Utah. Can the State of Ohio do this without violating Due Process and Equal Protection of the law?

3. Is one year sufficient time in which to file an appeal on a case where the record is sealed and the courts will not confirm or deny that the hearing was held and whether or not an adoption was granted? Is this such a short time as to in effect, deny due process and equal protection of the law? This is provided for in Ohio Civil Rule 60 (B)(3). It was first brought to the attention of the Tenth District Appellate Court as was Question number one above. Question number three was first brought to the attention of the Ohio Supreme Court.

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AUTHORITIES

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OPINIONS BELOW

The Ohio Supreme Court dismissed the Motion to Certify the Record sua sponte and held that a constitutional question was not presented to the court. The order is included in Appendix A.

The opinion of the Tenth District Appellate Court affirming the trial courts decision is included in Appendix B. Information as to whether or not it has been reported is not available to petitioner.

JURISDICTION

The dismissal sua sponte was entered by the Ohio Supreme Court on May 18, 1985. This petition for certiorari was not filed less than 90 days from the date aforesaid. However, on petition the court granted an extension for good cause shown. The jurisdiction of this Court is invoked under USC 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States, Amendment 14,

Section 1.

> Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Ohio Civil Rule 60 (B)(3) is included in Appendix C.

Revised Code 3107.17 is Appendix D.

STATEMENT OF FACTS

Petitioner, DAVID W. STEWART, was married to respondent, SANDRA S. SEARS. A child, SHERRI LYNN STEWART, now SEARS, resulted from that marriege. When petitioner obtained a divorce from respondent, custody of the child, went to respondent. Petitioner was to pay child support, and attempted to do so. Respondent refused to accept and cash the support checks. Petitioner advised respondent that he was not sending any more checks until respondent was ready to accept them. She never did. During February, 1963, respondents, Mr. and Mrs. Sears, were married. Soon thereafter respondents disappeared with petitioners daughter. Petitioner had no knowledge of the whereabouts of his child from February, 1963 until about April, 1974. At the time they filed for adoption in November, 1966 in Columbus, Ohio, they could not be located there. In October, 1966 respondent, Mrs. Sears, visited petitioners Mother and found that petitioner was disabled and living is California. In November,

1966 respondents filed a petition for adoption for adoption in Columbus, Ohio. The hearing was scheduled for December,1966. Petitioner was disabled and could not attend. The law did not require and neither the Court nor respondents ever advised petitioner whether or not the hearing was held and whether or not the petition was granted. In the years that followed the trial court refused to admit or deny the adoption.

In 1974 petitioner found that a copy of the Final Decree of Adoption had been filed with the divorce papers in a Court in Salt Lake City, Utah. Also, in 1974 petitioner found respondents living near Pittsburgh, Pennsylvania. Petitioner sought to obtain an attorney to represent him to appeal the adoption on the grounds of fraud. Petitioner contacted at least six attorneys, all of whom advised him to forget it. They all said substantially the same thing. "The record is sealed, theres nothing you can do." The problem being, that one cannot appeal without a transcript.

In 1980 petitioner finally found an attorney who would represent him. In March, 1983 he filed a Complaint and Interrogatories for respondents to answer. They did not, so petitioner filed a Motion to Compel Answers. Petitioner advised his Counsel to also file a challenge to the constitutionality of the law at that time. He refused to do so, aluding to the idea that it was not the proper time to. On May 24, 1984 a hearing was held on petitioners Motion to Compel Answers. The Complaint was dismissed.

Petitioner appealed to the Tenth District Appellate Court. Also, petitioner requested a transcript of the proceedings in the trial court. The Court refused to provide a transcript of both the adoption proceedings and the hearing on the Motion to Compel Answers. The Court refused to provide the transcripts.

Petitioner filed another appeal with the Tenth District Appellate Court to direct the trial court to provide the transcripts. The appeal was denied. The Court ruled that the

appeal was barred by a one year statute of limitations. Ohio Civil Rule 60 (B)(3). The Court also held that a challenge the constitutionality of the law was barred as well by the one year statute of limitations.

Petitioner appealed to the Ohio Supreme Court. The Court dismissed the appeal sua sponte saying that a constitutional question was not presented.

REASONS WHY CERTIORARI SHOULD ISSUE

Ohio R.C. 3107.04 thru 3107.19 is a judicial procedure which provides for the adoptions thru the courts. Each provision is interdependent upon the other provisions. If one or more provisions are invalid as repugnant to the Constitution of the United States, then the whole must be ruled invalid.

The Tenth District Appellate Court erred when it ruled that both of petitioners appeals were barred by Civil Rule 60 (B)(3). This rule provides a one year limitation on appeals. State statutes do not apply tochallenges to the constitutionality of the law. The court should have tested the constitutionality of the law first, if it is valid, then the law applies. If it is invalid, then the one year limitation does not apply. This is true for the following reasons. Should the law be invalid, the court must assume that the law could not have been written in a constitutionality acceptable form or the legis-

lature would have done so. Therefore, all rul' gs summons and decrees issued under the law are invalid. Also, that those rulings, summons and decrees would not have come about. because the law would not have come into existance but for its unconstitutional form. Therefore the adoption would never have occured. Also, therefore petitioner is not obliged to respond to a summons that issued under a law that is repugnant to the constitution. For the above reasons the Tenth District Appellate Court erred when it refused to rule on the constituticnality of the law.

The right to appeal is inherent in American Law and is protected by the 14th Amendment to the Constitution of the United States. Intrinsic in that right to appeal is the right to demand and to have made available to you a transcript of the proceedings from which you are appealing. Denial of a transcript effectively precludes access to the appellate process. This is a well settled principal of Constitutional Law. Griffin

V. Illinois, 351 US 12 (1956), Long V. District Court, 385 US 192 (1966), Mayer V. Chicago 404 US 189 (1971). While these are all criminal cases, the underlying principal remains the same, where an appellate procedure is established, the parties to the action are entitled to a transcript of the proceedings from which they are appealing. Not only did the Franklin County Probate Court refuse to provide a transcript of the adoption proceedings, they also refused to confirm or deny that the hearing was held, whether or not the adoption was granted and did not send petitioner a Final Decree of Adoption, a transcript of the hearing on the Motion to Compel Answers, the court dismissed the Complaint with prejudice. Since the granting of an adoption by the court is discretionary on the part of the trial court, for all practical purposes, as far as petitioner was concerned there may not have been anything to appeal from. How could petitioner appeal a matter that may not have been granted in the

first place? The trial court refused to confirm or deny whether or not the court had granted the adoption. Yet the same court ruled that the one year limitation applies and the Tenth District Appellate Court affirmed it. When it was brought to the attention of the Ohio Supreme Court, it ruled that a constitutional question was not presented to the court.

Petitioner questions the validity of Ohio Civil Rule 60 (B)(3). While a one year limitation for appeals may be adequate for residents of the State of Ohio, it can hardly be considered so for non-residents. Especially so when in the case at hand where the record is sealed and the court would neither confirm or deny the adoption.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment of the Ohio Supreme Court and the Tenth District Appellate Court. Also to review and issue a summary judgment on the validity of Ohio R.C. 3107.04 thru 3107.19 and Civil Rule 60 (B)(3), and to vacate

the adoption of petitioners daughter, Sherri Lynn Stewart, now Sears. Petitioner requests that the Court Provide whatever other relief the Court may deem appropriate.

David W. Stewart
1080 Douglas Circle
Helena, Montana 59601

PROOF OF SERVICE

The undersigned hereby certifies that 3 true and complete copy of the foregoing petition for writ of certiorari was sent to Mr. Donald G. Paynter of the law firm of Knepper, White, Arter & Hadden, 180 East Broad St. Columbus, Ohio 43215 -3736, by certified mail, return receipt requested this 29th day of October, 1985.

APPENDIX A

ORDER OF THE SUPREME COURT OF OHIO DISMISSING PETITIONERS APPEAL

THE SUPREME COURT OF OHIO

COLUMBUS

David W. Stewart, Appellant	:	1985 TERM To Wit: May 15, 1985
V.	:	Case No. 85-492
Richard P. Sears, et al Appellees	:	Motion for an order directing the Court of Appeals of Franklin County to Certify its Record.

It is ordered by the Court that this motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio do hereby certify that the foregoing order was correctly copied from the records of said Court.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date, _____.

JAMES WM. KELLY,
Clerk

SAM T. ADKINS
Deputy

OPINION OF THE TENTH DISTRICT COURT OF APPEALS FOR THE STATE OF OHIO

IN THE COURT OF APPEALS

TENTH DISTRICT COURT OF APPEALS

FRANKLIN COUNTY, OHIO

DAVID W. STEWART,	:	
Plaintiff-Appellant,	:	No. 84AP-732 (REGULAR CALENDAR)
V.	:	
RICHARD P. SEARS, et al	:	Opinion rendered on February 12, 1985
Defendants-Appellees	:	

Appeal from the Franklin County Common Pleas Court, Probate Division.

This is an appeal by plaintiff from a judgment of the Franklin County Common Pleas Court, Probate Division, denying plaintiff's motion to compel answers and sustaining defendants' motion to dismiss plaintiff'scomplaint.

The record indicates that, on March 23, 1983, plaintiff filed the following complaint against defendants:

> "1. PLaintiff, David W. Stewart, is the natural father of Defendant Sherri Lynn Sears.

2. Defendant, Sandra S. Sears, is the natural mother of Defendant Sherri Lynn Sears.

3. Plaintiff and Defendant, Sandra S. Sears were husband and wife on November 29, 1959, the date of the birth of Defendant, Sherri Lynn Sears.

4. On or about January 17, 1961, Plaintiff and Defendant, Sandra S. Sears, seperated. Around October of 1963, a divorce was granted in Illinois (should have been Utah) dissolving the marriege between Plaintiff and Defendant, Sandra S. Sears.

5. Around November of 1966, Defendant, Richard P. Sears, legally adopted Defendant, Sherri Lynn Sears, upon a Decree of Adoption being rendered by this Court. By the same decree of Adoption, the name of Defendant, Sherri Lynn Sears, was changed from Sherri Lynn Stewart to Sherri Lynn Sears.

6. Plaintiff never consented to the adoption of his natural daughter, Defendant, Sherri Lynn Sears.

7. Plaintiff after his divorce with Defendant, Sandra S. Sears, was at all times ready and willing to support and maintain Defendant, Sherri Lynn Sears, and was at all times ready and willing to give financial support to Defendant, Sandra S. Sears, for the support of Defendant, Sherri Lynn Sears. Plaintiff immediately after his divorce with Defendant, Sandra S. Sears, began sendingchild support checks to Defendant, Sandra S. Sears, for the support of Defendant, Sherri Lynn Sears. Defendant, Sandra S. Sears, however, refused to accept and/or cash these support checks. Plaintiff finally ceased sending these checks to Defendant, Sandra S. Sears, but only after advising her that whenever she wanted money to advise Plaintiff and that he would send money to her.

8. Plaintiff, from Christmas of 1962 until around April of 1974, did not know and could not find thewhereabouts of Defendants, Sherri Lynn Sears, and/or Defendant, Sandra S. Sears, and/or Defendant Richard P. Sears, even though Plaintiff continually attempted to locate Said Defendants during this Time.

9. Plaintiff was at all times ready and willing to support his natural daughter, Defendant, Sherri Lynn Sears and never wilfully voluntarily and/orintentionally failed to maintain or support her. Plaintiff, however, could not locate the whereabouts of his natural daughter, Defendant, Sherri Lynn Sears, or when the whereabouts was known, Defendant, Sandra S. Sears refused to accept and/or cash checks for support payments made by Plaintiff.

10. Defendants, Sandra S. Sears and Richard P. Sears, falsely represented to

this Court during the adoption proceedings initiated by Defendant, Richard P. Sears, that Plaintiff wilfully failed to maintain or support his natural daughter, Defendant, Sherri Lynn Sears.

11. When Defendants, Sandra S. Sears and Richard P. Sears, made the false representations that Plaintiff had wilfully failed to maintain or support his natural daughter, Sherri Lynn Sears, Defendants knew that such representations were false and that Plaintiff had at all times been ready and willing to support his natural daughter and had attempted to provide support payments for her to Defendant, Sandra S. Sears, and/or had attempted to locate his natural daughter, Sherri Lynn Sears, and/or Defendant, Sandra S. Sears, in order to make support payments available.

12. This Court relied upon these false representations of Defendants Richard P. Sears and Sandra S. Sears, and granted

> Defendant, Richard P. Sears, the adoption of Defendant, Sherri Lynn Sears, which adoption would not have been granted but for the fraud of said defendants in making their false representations to the Court. Wherefore, Plaintiff demands a declaratory judgment declaring that the adoption of Defendant, Sherri Lynn Sears, by Defendant, Richard P. Sears, is null and void, declaring that the decree of Adoption entered by this Court in said adoption is vacated and that the name of Defendant, Sherri Lynn Sears, be changed back to Sherri Lynn Stewart; and for such other relief as may be applicable.

Also on March 23, 1983, plaintiff submitted interrogatories for defendant, Sandra S. Sears, to answer. On April 19, 1983, defendants, Richard P. Sears and Sandra S. Sears, filed a motion under Civ. R. 12(B)(6) for an order dismissing plaintiff's complaint for the reason that it

appears on the face of plaintiff's complaint that plaintiff has failed to state a claim upon which relief can be granted. On May 10, 1983, plaintiff filed a motion for extension of time in which to respond to defendants' motion to dismiss complaint for the reason that written interrogatories filed contemporaneously with the complaint had not been responded to by defendant. On April 2, 1984, plaintiff filed a motion to compel defendant to answer interrogatories.

The record further indicates that, on May 16, 1984, the trial conducted a hearing on defendants motion to dismiss complaint and plaintiff's motion to compel answers to interrogatories. The trial court found that, based upon matters contained in the adoption proceedings and in the instant case, plaintiff was duly served by certified mail, in accordance with the statute then in effect, with notice of the adoption: that the adoption file contains a United States Post Office return receipt signed by plaintiff and dated November 18, 1966; that the notice to plaintiff clearly

states that the petition alleges that plaintiff had wilfully failed to properly support and maintain his daughter for two years immediately prior to the filing of the petition; that plaintiff did not appear at the hearing on December 18, 1966, for which such notice was given and all proceedings in the adoption hearing appear regular on their face; that all jurisdictional requirements were met; that since the probate court had jurisdiction in the adoption proceedings, which is the subject of the complaint herein, the adoption is final and not subject to collateral attack; that plaintiff's only remedy is a motion for relief from judgment pursuant to Civ. R. 60(B); that plaintiff's allegation in his complaint of fraud and misrepresentation on the part of defendants fits squarely within subsection (3) of Civ. R. 60(B) explicitly provides that any motion for relief under such subsection must be filed not more than one year after judgment is entered; that plaintiff is barred from raising the issues of

fraud and misrepresentation by his failure to file his complaint for relief for more than sixteen years after the adoption was granted; that, even assuming that plaintiff could prove that he was ready and willing to support his daughter and that defendants knew this, there was no reason for defendants to provide evidence that plaintiff's failure to support was willful inasmuch as R.C. 3107.06(B)(4) as it existed in 1966, provided "proof of failure to properly support and maintain the child for a period of more than two years immediately preceding the filing of the petition shall be prima facie evidence of wilful failure to properly support and maintain the child". The court further held that plaintiff admitted that between Christmas of 1962 and April of 1974 he did not know the whereabouts of defendants and therefore if he did not know their whereabouts he could not have provided support for the child; that therefore defendants could accurately testify that support was not given for a two-year period prior to filing the adoption proceedings which is

prima facie evidence under the statute which, if unrebutted by plaintiff, was sufficient to establish willful failure to properly support the child; and that, even though there was testimony that defendants knew that plaintiff was ready and willing to support the child, such testimony was unnecessary because of plaintiff's admission that he had not supported the child for four years prior to filing the petition for adoption and plaintiff's failure to respond in any way to the notice of the adoption proceedings at the time of the hearing or within one year thereafter. The court then denied plaintiff's motion to compel answers and granted defendants motion to dismiss plaintiff's complaint from which judgment this appeal is taken.

Plaintiff sets forth the following three assignments of error;

1. Appellant was denied the right to Appeal.

2. The time constraints of rule 60(B)(3) are unreasonable so as to in effect deny the

right to appeal.

3. The fraudulent misrepresentations alleged in the Complaint should be sufficient to reverse the adoption.

Plaintiff argues in support of his first assignment of error that following the final decree of adoption the record was sealed and thatfrom that point on the law prevented plaintiff from access to the records which effectively prevented plaintiff from an appeal based on the contents or lack thereof. The record is clear that plaintiff was served with the summons of the adoption hearing in 1966, and in fact, plaintiff admits he was so served in his brief, however, plaintiff did nothing; plaintiff slept on his rights and now complains that he was not afforded an appeal. Civ. R. 60(B) provides that motions for relief from judgment based on fraud of an adverse party, such as alleged in this case, must be made "*** not more than one year after the judgment, order or proceeding was entered or taken. * * *" In

this case, plaintiff first raises the issue in the trial court sixteen years after the final adoption was entered, which is clearly outside the requirements of the rule and well beyond a reasonable time for filing and Civ. R. 60(B) motion. Plaintiff's first assignment of error is not well taken and is therefore overruled.

With respect to the second assignment of error, plaintiff is in no position to raise this issue inasmuch as it has taken him sixteen years from the time final judgment was rendered before raising such issue. Civ. R. 60(B) is not a substitute for appeal which lapsed in 1966. If Civ. R. 60(B) is the appropriate remedy, plaintiff's action in filing his complaint was far too late. Even if the time limit of Civ. R. 60(B) were arguably unreasonable, as it possibly might be in some unusual case, certainly sixteen years is not an unreasonable time under the circumstances of this case. Plaintiff's second assignment of error is overruled.

In support of his third assignment of error, plaintiff argues that he did not know the whereabouts of defendants or his daughter until April of 1974. However, plaintiff did not file his complaint until over eight years after he located defendants and his daughter. Plaintiff's argument should have been raised on appeal or in a timely-filed Civ. R. 60(B) motion. Here, plaintiff's action was not timely filed under any circumstances. Plaintiff may not have known where the defendants or his daughter were but, certainly, plaintiff knew or should have known the whereabouts of the Franklin County Courthouse where the papers should have been timely filed. A Civ. R. 60(B) motion is discretionary with the trial court; no abuse of discretion has been shown. Plaintiff's appeal in this case appears to be frivilous and if attorney fees had been asked, the Court would have been inclined to grant same upon proper presentment of proof. Plaintiff's third assignment of error is overruled, and the

judgment is affirmed.

Judgment affirmed.

WHITESIDE and BROGAN, JJ., concur.

BROGAN, J., of the Second Appellate District, sitting by assignment in the Tenth Appellate District.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

David W. Stewart

Plaintiff-Appellant, : Probate 240,095A

V. : No. 84AP-732
(REGULAR CALENDAR)

Richard P. Sears et al.,:

Defendants-Appellees :

JOURNAL ENTRY OF JUDGMENT

For reasons stated in the opinion of this court rendered herein on February 12, 1985, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Probate Division, is affirmed.

STRAUSBAUGH, WHITESIDE & BROGAN, JJ.

By Judge Dean Strasbaugh

BROGAN, J., of the Second Appellate District sitting by assignment in the Tenth Appellate District.

CIVIL RULE 60(B)(3).

RULE 60. Relief from judgment or order.

(A) Clerical mistakes.....

(B) Mistakes; inadvertance: excusable neglect; newly discovered evidence; fraud; etc. on motion and upon such terms as are just, the court may relieve a party of his legal representative from final judgment, order or proceeding for the following reasons: (1) mistake, inadvertance, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic). misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or etc.....

APPENDIX D

REVISED CODE 3107.17

RECORDS AND PROCEEDINGS TO BE CONFIDENTIAL

(A) All hearings held under this chapter shall be held in closed clourt without admittance of any person other than essential officers of the court, the parties, their witnesses, counsel, persons who have not previously consented to an adoption, but are required to consent, and representatives of the agencies present to perform their official duties.

(B)All papers and records pertaining to a placement, etc.

(C) The petition, the intlocutory order, the final decree of adoption, and other adoption proceedings shall be recorded in a book kept for such purposes and seperately indexed. The book shall be a part of the records of the probate court, and all consents, affidavits, and other papers shall be properly filed. Such papers, records, and books shall be available for inspection upon the consent of the court.

(D) All forms, etc.....

PETITIONERS AFFIDAVIT

DAVID WINSTON STEWART, being first duly sworn, disposes and says that the above statements made by him in the foregoig Petition for Writ of Certiorari are true, correct, and complete to the best of his knowledge and belief.

David Winston Stewart

DAVID WINSTON STEWART
1080 Douglas Circle
Helena, Montana 59601

Subscribed and sworn to before me this 25th day of October, 1985.

Notary Public

My commission expires 6-1-86